Supplement to CASE 06-210 to Aid FCC

in Citing's from Voluminous Record.

1) The sole critical question originating from by the District Court was: "whether **section 2.1.8** permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." At least **8 statements** within the opinion decided that the transfer of traffic without the plan should **not** be permitted under the FCC's Section 3.3.1.Q theory **but is permitted under Section 2.1.8.** We agree 100%. The $50 AT&T fee charged in the tariff (JA 495) on traffic only transfers proves AT&T willfully deceived everyone for 10 years as to the permissibility of traffic transfers without the plan. Based upon AT&T's oral argument we now see specifically where in 2.1.8 traffic only transfers were allowed and how this enlightenment clarifies the Courts confusion regarding obligations issues.

2) The opinion gives the erroneous impression the transaction orchestrated by the Inga Companies in Jan 1995, wasn't attempted and complied with under 2.1.8: Decision pg 4 para 2: "The parties attempted to structure the transaction to avoid Section 2.1.8, so that PSE would not have to assume CCI's obligations on the transferred service." The record is very clear all requirements were met under Section 2.1.8: Inga Preliminary Statement JA pg 48: "**The parties agree that the transfer would be governed by AT&T tariff FCC NO. 2 Section 2.1.8.";** Initial Inga Comments Para. 53: "In fact the tariff and AT&T's own form, the Transfer of Service or Assignment (TSA) form, made it possible. We did an assignment of end-user accounts **as per the tariff** and what had been commonly accepted in the marketplace for years." Inga Post Oral brief: "The FCC's view of the transaction hinges on section 3.3.1.Q of AT&T's tariff. It has **always been Intervenors position that section 2.1.8** expressly allows for the transaction intended in transferring the accounts to PSE." The District Court understood also: District Opinion (JA 61): "The manner in which such a transfer is carried out is by the submission of a Transfer of Service Agreement and Notification form ("TSA"), executed by both parties to the transfer to AT&T."; The 9 AT&T (TSA's) used at (JA 175-183) to effectuate the traffic transfer, **are all verbatim tariff section 2.1.8**. Even AT&T admits that our traffic transfer attempt was done under 2.1.8: AT&T Comments JA 243: "On or about Jan 13th 1995 CCI made a transfer request to AT&T- ostensibly **under Section 2.1.8** of AT&T Tariff FCC No 2 -that it be allowed to transfer all the traffic (i.e. all locations subscribed under the CSTPII plans at issue), but not the plans themselves to Public Services Enterprises of Pennsylvania, Inc. ("PSE"); AT&T Comments JA 249: "CCI ostensibly sought to transfer the traffic-but not the plans themselves- to

PSE **under Section 2.1.8** of AT&T's Tariff No. 2 Section 2.1.8. Even the FCC recognized our **request** was under 2.1.8: FCC Ruling: JA 6 "We conclude that **section 2.1.8** of AT&T's tariff did not addressor govern **CCI's and PSE's request** and that its respective tariffs with CCI and PSE permitted the movement of traffic at issue here"

3) The Inga Companies, the District Court, AT&T and even the FCC understood our request was under 2.1.8 "**as per the tariff."** This Court was simply confused by the FCC's erroneous position that we **could have used 3.3.1.Q . If we used 3.3.1.Q** we would use AT&T Add /Delete forms, as the one at JA 504. **We used TSA's to apply 2.1.8**. JA 175.

4) Which obligations were actually assumed by PSE ***was never an issue prior to the DC Court***. AT&T never stated before the District Court or FCC that PSE did not intend to accept all obligations of the former customer. AT&T's only bogus argument was PSE should also assume shortfall obligations, not required in 2.1.8 on our traffic transfers.

5) AT&T minted a new and bogus defense **only before the DC Court** stating that PSE **did not accept any obligations**. AT&T stated that the customary instructional notations on the TSA form, that were necessitated due to 2.1.8's multiple types of transfers, were an attempt to amend 2.1.8.The Court relied upon this bogus and late 405 violation defense despite our post oral argument brief detailing why the defense was bogus, and that it was a 405 violation in any event, and by law could not be relied upon. It is evident that the Court relied upon the bogus and late defense because within its' opinion erroneous statements such as these two were made: **1st)** "The Commissions interpretation eviscerates this very purpose, allowing PSE to take up essentially all of CCI's resale business without assuming **so much as one** of CCI's obligations to AT&T." Pg 10; **2nd)** "Second the FCC's interpretation, permitting the movement of benefits **without any assumption of obligations"** Pg 10. There is nowhere in the record prior to the DC Court filings in which AT&T states that zero obligations were attempted to be transferred. The DC Court relied on late and bogus AT&T info.

6) The Decision did not come to a conclusion as to what obligations were required and assumed by PSE but should have come to the conclusion that the record indicates that all obligations of the **former** customer stated in 2.1.8 were assumed. The following 3 AT&T statements further show clearly that it was AT&T's position that PSE was assuming **all the obligations of the former customer** in 2.1.8 but AT&T also wanted PSE to assume shortfall and termination charges: **1st)** AT&T JA 250: "the transfer of traffic and not the underlying plans was with the intent to avoid the payment of AT&T's tariffed shortfall and termination charges."; **2nd)** AT&T Reply Comments JA 533: Petitioners were precluded under the governing tariff from transferring their CSTP II plans to PSE unless PSE agreed to assume

all of the Petitioner's obligations under those same plans, ***including tariffed shortfall and termination charges***." **(No emphasis added on italics) 3rd)** AT&T Reply Comments: Footnote 9 JA 535 "In fact as explained in its initial comments, the basis for AT&T's "fraudulent use" claim was that the proposed transfer would have transferred the entire revenue stream to PSE without the corresponding obligations to **pay any shortfall and termination charges** under the CSTPII plans..." These quotes clearly show that it was AT&T's position before both the NJ District Court and FCC 2003 that PSE assumed **all the obligations** of the **former** customer ..required within 2.1.8. If AT&T actually believed PSE was not attempting to assume bad debt or unexpired time obligation required by 2.1.8 on traffic only transfers , **AT&T surely would have raised this to the District Court or within its 2003 Comments to the FCC**. AT&T only stressed that PSE was not **ALSO** assuming alleged shortfall and termination, which were not required by 2.1.8 on traffic only transfers.

7) The following three quotes show the FCC recognized that the notations placed on the TSA form that I dictated to CCI and Mr Shipp in his comments to the FCC confirmed were simple instructions to move traffic and not the plans. **1st)** FCC Decision: JA pg.3: "At the bottom of each TSA, in handwriting, these parties directed AT&T to move the "Traffic Only" on each plan to PSE. The January 13th cover letter, under which these nine TSAs were forwarded, directs AT&T to "move the locations associated with these plans [but] not in any way to discontinue the plans." (Exhibit H to petition). In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, but not to move the actual plans themselves."; **2nd**) FCC Decision: JA pg 8 para 10. "Thus **AT&T argues** "if **only the traffic** on the plans **and not the plans** themselves were transferred to PSE"; **3rd)** FCC Decision: JA pg.8 -9 para.11"Further, CCI (as well as the Inga Companies) but not PSE, would continue to have been responsible for any shortfall obligations under the CSTPII/RVPP plans." This last quote shows all other obligations were assumed other than shortfall/termination obligations, which did not have to be assumed by PSE on a traffic transfer. It is totally absurd for AT&T to state that the notations on the TSA which were also accompanied with an explanatory cover letter meant move traffic but not all obligations of the FORMER Customer that were required. The NJ District Court had no problem understanding that PSE assumed all obligations of the **former** customer on the TSA, as evidenced in these quotes: **1st)**May 1995 Decision. (JA 59) "As under the arrangement with plaintiffs, AT&T bills PSE's end users directly, subtracting from the bill that amount of discount allotted by PSE to each individual end user. In turn AT&T remits to PSE the difference between the latter's 66% overall discount and that passed on to the

end user." The previous sentence was footed number 5 and stated: "As in the plaintiffs' case AT&T deducts from the RVPP discount/rebate remitted to **PSE any bad debt** or unpaid bills accrued by its end users." **2nd)** May 1995 Decision. (JA 65) "AT&T was further troubled by the fact that if only the traffic on the plans and **not the plans themselves** were transferred to PSE, the liability for shortfall and termination charges attendant thereto.... **4th)** May 1995 Decision. (JA 67): AT&T **replies** to that assertion by arguing that since **ONLY THE TRAFFIC** on the plans was passed to PSE, and **NOT THE PLANS** themselves with their attendant liabilities." These quotes clearly show bad debt was going with the traffic to PSE. The following Inga quotes show the traffic transfer was done as per the tariff and all obligations required were to be assumed by PSE: **1st)** Inga Para 53 JA 446: "In fact the tariff and AT&T's own form, the Transfer of Service or Assignment (TSA) form, made it possible. We did an assignment of end-user accounts **as per the tariff** and what had been commonly accepted in the marketplace for years." **2nd)** Inga Para 58 JA 447:"AT&T's right to collect from the aggregator if the end-user didn't pay their bill **followed each new plan** to which the end-user accounts were being transferred or assigned. AT&T was totally protected. In fact AT&T was even in a better credit risk position because the plan where the accounts would be going would have additional revenue **to debit the aggregator if the end-user didn't pay their bill to AT&T**!"; **3rd)** Inga Comments Para. 52 JA 446:"This actually would have put AT&T into an even better position to collect shortfall penalties because after the assignment to PSE, AT&T could go after both the Inga Companies and CCI. In addition, **AT&T could go after PSE for bad debt.** AT&T was not exposed to being deprived of its charges. AT&T has stated that when the original transfer of the plan took place between the Inga Companies and CCI that the former customer (the Inga Companies) would remain jointly and severally liable."; **4th)** Inga Para. 63 JA 450: "AT&T's is in a Better Security Risk Position after Assignment The Court's understanding that there was no credit risk was right. The subject accounts continued to be billed by AT&T and the volume was so large that **bad debt** was not capable of becoming an issue. **Moreover, the credit risk went with the accounts** no matter who owned them." Per AT&T's request bad debt goes with traffic.

8) The Inga Companies, The FCC, The NJ District Court and even AT&T all acknowledged that all the obligations of the former customer, which mimicked section 2.1.8 verbatim, were assumed by PSE. AT&T's 405 violation "Traffic Only" meant many years later that zero Obligations were requested to be transferred defense is so preposterous that it shows how desperate AT&T is for a defense. To cause the deception AT&T first "short quoted" the actual notations on the TSA down to: "Traffic Only", then incredibly makes the years **late** and bogus argument that CCI/Winback

only wanted to move traffic and PSE wasn't assuming **any** of the obligations on the traffic. Absolutely nowhere in the record does it say that PSE wasn't willing to assume all of the obligations of the former customer on the TSA. See JA 174 which is a cover letter that went to AT&T **with the 9 TSA's**. This explains that only the traffic was being transferred and not the plan. This shows that AT&T's late comment stating notations on the TSA were meant to move traffic only but not the obligations are false. It clearly meant to move the traffic and **not the plans.** For the DC Court to be misled by AT&T on this 405 violation was a major error. One of the 9 TSA's actually states "Traffic only move all BTN's except 181-000-0142-457, 131-134 0230-254 CSTP/Keep Plan # 3663 Intact. Simple instructions were necessitated due to the multiple types of traffic transfers implemented with the TSA. AT&T misrepresented to the DC Court that these notations meant to AT&T that the aggregator sought to separate the indebtedness on the accounts from the traffic revenue on the same accounts. AT&T argued that this was an attempt to amend 2.1.8, however it is clear that the entire notations were customary instructions. The tariff doesn't even offer the option of separating the traffic revenue from potential indebtedness on the same account. This newly minted DC Circuit defense by AT&T was never heard prior to the DC Court filings. It's not only bogus, but its a clear 405 violation that the DC Court was misled on. The DC Court opinion was slanted by an AT&T 405 violation defense that should not be relied upon, especially a bogus one at that, and one that is contrary to several of AT&T's own statements: The following is case law showing this Court should not have relied on AT&T's defense: *Bartholdi Cable v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997); *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C. Cir. 2001); *Verizon Telephone Cos. v. FCC*, 292 F.3d 903, 909-910 (D.C. Cir. 2002); and *AT&T Wireless v. FCC*, 365 F.3d 1095, 1099 (D.C. Cir. 2004). While it is true that the DC Court decision does not conclude which obligations were to be assumed by PSE, the only mention in the decision that **all obligations were assumed** by PSE was relegated to a footnote buried on the last page: Decision Footnote pg. 11. "At oral argument, AT&T counsel repeatedly stated that Tariff No. 2 expressly required PSE to assume the volume commitments that form the heart of AT&T's concern in this case. See transcript of oral argument11, 13. In a motion submitted after the argument however, the Inga Companies note that the only obligations enumerated by Section 2.1.8 are "outstanding indebtedness for the service" and the unexpired portion of any applicable minimum payment period.**"**Intervenors Motion to Clarify and Correct the Facts of the Record at 4. How this enumeration affects the requirement that new customers assume" *all* obligations of the former

Customer" is beyond the scope of our opinion." AT&T got the DC Court to focus on all Obligations and not "of the former customer" Scam me one shame on you scam me twice shame on me. The FCC cannot let this happen again.

9) At the time of the transaction Section 2.1.8 found at FCC Ruling JA pg.6 provided:

Transfer or Assignment- WATS, including ***ANY*** associated telephone number***(s)*** **(emphasis added),** may be transferred or assigned to a new Customer, provided that: A. The Customer of Record (Former Customer) requests in writing that the company transfer or assign WATS to the new Customer. B. The new Customer notifies the Company in writing that it agrees to assume all obligations (emphasis added) of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s). CSTP plans are AT&T discount plans for large customers with **many locations.** An AT&T Location Specific Term Plans (LSTP) is for one location. The fact that the tariff language allows for **ANY number(s) (Singular** or Plural), of number transfers, is clear indication that any subset of traffic, i/e. WATS transfers are expressly permissible under section 2.1.8. The tariff does not use the word: **"ALL"** it uses the word **"ANY"** before the amount of accounts to be transferred. Any of course means: One, or some, without specification. Therefore it is clear that since 2.1.8 allows **any number**(S) of accounts **less than all** of the accounts to be transferred, obviously means some, or almost all of the traffic can be transferred. Likewise take notice that the word **number(s)** has in parenthesis the **(s)** which of course means that 1 single number or any amount of numbers of WATS accounts, aka locations, aka BTN's, aka phone numbers can be transferred. If **all** the accounts that were on a plan had to be transferred then the singular option "**number"** and "**any"** would not be available. It would have to say **all numbers**!

10) AT&T Counsel David Carpenter was trapped by Judge Roberts during oral argument and admitted this:

JUDGE ROBERTS: Why not? The tariff says they have to **assume all the obligations**. (Oral: Pg 12, Line 9) MR. CARPENTER: "**Yes, but what it means to assume all the obligations.** What obligations apply **may vary depending on what's** transferred. "In some cases the **only obligation** that may be transferred is **going to be the outstanding indebtedness.**" Thank you! Mr. Carpenter's admission not only further confirms that traffic can be transferred without the plan under 2.1.8. BUT MOST IMPORTANTLY also confirms that **all of the obligations** assumed **depends upon what is transferred.** Now it is clearly understood that "**all the obligations of the former customer "** pertain only to the traffic selected for transfer within para. A. Para. B conditions A. Yes the new customer must assume all of the obligations of the former customer , **BUT only on what the former customer transfers.** Bad

debt i.e. indebtedness is attached to the traffic that produced the bad debt. Shortfall obligations are attached to the plans volume commitments. **Since the plans were not being transferred the alleged shortfall does not have to be assumed by PSE.**

11) Termination penalties were no issue as AT&T admitted the plans were to stay intact. FCC Ruling Footnote 56 at JA 008: "Although AT&T also argues that the move also avoided the payment of tariffed termination charges, id., it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) **is not at issue here. Opposition at 3 n.1.** That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter." The plans remained in tact. This confirms AT&T's position that S&T charges stay with plan.

12) The DC Court now recognizes Section 2.1.8 allowed for **multiple types of transfers** and therefore the AT&T TSA form was used to implement multiple different types of transfers. The Court agrees that the one TSA can either allow a plan transfer or a traffic only transfer. The AT&T TSA actually allowed 4 types of transfers and all 4 types were elaborated on in detail in the Inga Comments Para 66.JA 450 "The AT&T TSA was used for multiple types transfers because section 2.1.8 allowed multiple types of transfers. Therefore **instructional notations** to tell AT&T what type transfer were needed. The AT&T TSA mimicked 2.1.8 exactly as David Carpenter explained during Argument: Oral Pg. 13: CARPENTER: "No, but the transfer form happens here to say **exactly** what the tariff says, and the only way you can satisfy the tariff is either use our form or submit in writing something that says exactly what our form says."

13) AT&T understood that Shortfall & Termination obligations stayed with the non-transferred PLAN and that is why it requested security from CCI/Winback on the remaining plan. The NJ Court "To the extent however that AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T."

Petitioners Joint Reply JA 312:"The Court stated that the parties **could revisit the issue of security** at any time in the future upon the filing of appropriate papers supported by **credible documentary or testimonial evidence**.

14) Judge Roberts was concerned over what benefits remained with the CSTP plans with little accounts remaining on them. Judge Roberts asked for one example from the FCC during oral argument, here are seven: **1)** The record shows

CSTPII plans were renewable at our discretion whereas PSE's CT-516 was not**. 2)** The record is clear that it was our intention to take the traffic back, thus you needed a CSTPII plan to take the accounts back to. FCC Ruling JA 6 Footnote 44:"We note that the agreement between CCI and PSE expressly provided for the return of accounts to CCI upon request. *See* Exhibit G to Petition" (Exhibit G is found at JA 172)" Preliminary Statement JA pg. 29. Footnote 3:"By splitting the traffic from the plans in accordance with the established practices followed by the aggregators and AT&T, CCI assured itself of being able to **take the traffic back** under the CSTPII plans it had acquired from the Inga Companies. These plans were of particular value because they were pre-June 17th, 1994 plans and, therefore exempt from shortfall changes." **3)** The plans were Pre June 17th 1994 issued thus shortfall immune, and tariff Section 2.5.7 rights had been enacted on them for AT&T's failure to allow end-user term plan assumptions. **4)** No Security Deposits. The security deposit requirements had already been met, therefore we would not have to come up with $13.5 million dollars on a new plan. It would be an enormous benefit of being able to merge the existing CSTPII plan into a new Contract Tariff instead of having to post enormous security deposits. **5)** Plans had fiscal year ends not calendar year ends, so if the plans were subjected to shortfall the 9 plans had various fiscal years and therefore the ability to move traffic between plans for additional income. **6)** Ability to enroll without penalty AT&T users who were under LSTP contracts, which was 80% of its base. **7)** Promos like air travel, etc based on plan longevity.

15) The NJ District's **only question** was: "whether **section 2.1.8** permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." The District stated: There are no other "tangible concerns." This Court agrees 2.1.8 permits traffic transfers without the plan; that is what this Court was supposed to decide, all else was of no concern. The answer to the question is in the opinion, it should be the: "All we Decide" The Court pg.11 "All we decide is that section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming **any** obligations." **Any** here obviously means no obligations. We agree you can't transfer traffic without **any** obligations. The only two obligations that are required on a traffic only transfer were indeed transferred to PSE.

d/s Alfonse Inga
Alfonse G. Inga Pres.
9-10-13